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A STUDY OF THE SIGNIFICANT ASPECTS OF GERMAN CONTRACT LAW*

MANFRED PIECK**

I. FREEDOM OF CONTRACT (PARTY AUTONOMY)

Freedom of contract (*Vertragsfreiheit*) is a right protected by the Basic Law.¹ Contracts do not require consideration, can contain whatever the parties agree upon (*Inhaltsfreiheit*) and, unless specifically required by law, do not have to be in any particular form (*Formfreiheit*). Nevertheless, the parties do not have complete freedom as to the contents of a contract,² nor is the freedom to conclude or not to conclude a contract (*Abschlussfreiheit*) unlimited. For example, whenever there is a monopoly, either created by law (such as public utilities and public transportation) or in fact (*e.g.*, if the X company is the only supplier of fertilizer in a particular farm area), the mo-

* *Editorial Staff*: Wolfram Siemens, assessor in the Federal Republic of Germany and LL.M. candidate, and Kyle Frazier & Paul Maddox, both J.D. candidates, 1997, all attending Golden Gate University School of Law. Ursula Germann, assessor in the Federal Republic of Germany and LL.M. candidate at Golden Gate University School of Law, also assisted in this article. *Editors' Note*: Professor Pieck's purpose in this article is to provide comprehensive and accurate coverage of German contract law. The primary goal of this study is to permit other scholars, particularly Asian legal scholars whose legal systems are sourced in some way in the German Legal System, to have these materials available to enable them to acquire a deeper and fuller understanding of the German provenance of those parts of their legal systems. Secondly, its aim is to provide "raw materials" for any scholar who wants to use them for a comparative purpose. Finally, the materials are here to be consulted by anyone who (for whatever reason) wants to inform himself of some aspects of German substantive contract law.

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1. See Grundgesetz (GG) Art. 2(1) (Federal Constitution).

2. See *infra* Part II.

nopoly is legally obligated to enter into contracts concerning whatever it monopolizes, that is, the monopoly is under a compulsion to contract (*Kontrahierungszwang*). The freedom to conclude or not to conclude contracts can also be limited by the existence of a prior contract (*Vorvertrag*). For example, A may have entered into a binding contract with B to grant a loan to B. This *Vorvertrag* obligates the parties to conclude the future contract, and in that way limits their contractual freedom.

II. GENERAL LIMITATIONS AND OTHER PARAMETERS

A. VIOLATION OF STATUTORY PROHIBITIONS

Contracts which violate a statutory prohibition are void, unless it appears from the statute that the prohibition was not intended to nullify contravening contracts. In the absence of express language in the statute, it becomes a matter of interpretation whether or not its prohibitory provisions were intended to nullify contravening contracts. It is thus possible that a contract which violates a statutory prohibition is valid when the prohibiting statute contains no express language invalidating a contravening contract. For example, a contract entered into on a Sunday in violation of a statute forbidding business transactions on Sunday has been held to be valid where it did not spell out that a violating contract is invalid. Nevertheless, if a statute prescribes that a contract requires a government license, a contract entered into without the required license would be void. If a contract violates any of the fundamental rights contained in the Basic Law, such contract would also be void. For example, if a clause in an employment contract provided that the employment was to be terminated upon the marriage of the employee, such clause would be void.

B. CONTRACTS VOID IF CONTRARY TO GOOD MORALS

Contracts which are immoral are void because of § 138(1) of the Civil Code which provides: "A legal transaction is void if it is contrary to good morals." "Immoral" appears to be understood by the German courts as anything which contravenes the sense of decency of every person who possesses an understand-

ing of what is just and equitable.³ In any event, to determine whether or not a contract is immoral as a practical matter requires a reference to the relevant case law. Case law has held that immorality includes, but is not confined to, sexual immorality. Contracts in restraint of trade and contracts which oppressively restrict a person's independence or economic freedom have also been held to be immoral and thus void.

C. UNDUE ADVANTAGE

Contracts which take an undue advantage of a person are considered usurious and void. Section 138(2) of the Civil Code⁴ provides:

A legal transaction is void when a person exploits the distressed situation, the inexperience, the lack of judgment, or the grave weakness of will of another to obtain the grant or promise of a pecuniary advantage for himself/herself or a third party which is obviously disproportionate to the value of the performance of the former.

Section 138(2), known as the usury clause, however, has not been extensively interpreted or applied by the courts.

D. IMPOSSIBILITY

A contract, the performance of which is impossible at the time it is concluded, is void. This rule applies to contracts as to which performance was already impossible at the time the contract was made.⁵ If a party knew or should have known of such impossibility, notwithstanding the nullity of the contract, he is required to compensate the other party for the out-of-pocket expenses which the latter incurred in connection with performing his part of the contract except where the latter also knew or should have known of the impossibility. Stated more generally, the innocent party is entitled to be put in the posi-

3. See *Entscheidungen des Reichsgerichts in Zivilsachen* (RGZ) RGZ 48, 124; *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ) BGHZ 10, 232.

4. *Bürgerliches Gesetzbuch* (BGB) (Civil Code), (I.S. Forrester et al. trans., New Jersey, 1975) [hereinafter BGB].

5. BGB § 306.

tion he would have been in had he not relied on the validity of the contract. However, if performance becomes possible after the contract was entered into, the contract is then considered valid provided it appeared at the time of the making of the contract that such change would occur and the contract was expressly entered into in view of this possibility.⁶ It should be noted that the rules of §§ 307-308 also apply analogously to contracts which contravene statutory prohibition.⁷

E. USUFRUCT

Contracts by which a party obligates himself to assign or to subject to a usufruct all or part of his future property or a fraction thereof are void.⁸

F. ESTATE OF LIVING THIRD PERSON

Contracts concerning the estate of a still living third person, including contracts relating to an expected compulsory portion or to an expected legacy from such an estate, are void. However, a contract entered into by such third person's future statutory heirs concerning the statutory share or compulsory portion of one of them is valid if the contract has been authenticated by a notary.⁹

G. SPECIFIC KINDS OF CONTRACTS

In a number of situations, the law will prescribe the contents of particular kinds of contracts, *e.g.*, apartment leases, standard conditions of business, and contracts restricting competition.

6. *Id.* §§ 307-308.

7. *See id.* § 309.

8. *Id.* § 310.

9. *Id.* § 312.

III. FORM REQUIREMENTS

Unless the law provides otherwise, oral contracts are generally valid and may be proved by any type of evidence. However, certain contracts must be in writing; the most important of these include:

1. The *inter vivos* establishment of a foundation;
2. Assuming or assigning a mortgage;
3. A lease for more than one year;
4. A promise of an annuity;
5. Guaranty and surety contracts (unless the transaction is a commercial one for the guarantor or surety);
6. A promise to pay or perform which is independent of and unrelated to any other obligation (*Schuldversprechen*);¹⁰ and
7. Acknowledgment of a debt (*Schuldanerkenntnis*).

If a writing is prescribed for a contract, the parties must all sign the same document. If several identical duplicate originals of the contract are prepared, it is sufficient if each party signs the duplicate original intended for the other parties.

Contracts by which a person promises to transfer or to subject to a usufruct all or part of his currently-owned property must be judicially or notarially authenticated.¹¹ All types of contracts concerning real property also require notarial (or judicial) authentication¹² as do promises to make a gift, which promises are then valid despite the absence of consideration. If notarial authentication of a contract is prescribed by law, it is

10. See *infra* Part VI.V.

11. BGB § 311.

12. *Id.* § 313.

sufficient if first the offer and later the acceptance of the offer are authenticated by a notary.¹³

IV. FORMATION OF CONTRACT: OFFER AND ACCEPTANCE

Although most of the rules governing the formation of a contract are found in Book One, Section III, Title 3 of the Civil Code (§§ 145-157) entitled "Contract" (*Vertrag*), there is no express provision in the Civil Code to the effect that a contract comes into existence as the result of an offer and an acceptance. Nevertheless, it is well settled that an offer and acceptance are required to form a contract.

Offers and acceptances are not effective until they reach the offeree (*zugang*) and have not been revoked in the meantime. Mere dispatch of the offer is not sufficient. On the other hand, it is not required that the offeree actually becomes aware of the offer; it is sufficient if the offeree has been put into a position where customarily he would become aware of the offer. For example, an offeror, during the night, leaves a written offer in the offeree's mailbox. The offer is considered to have "reached" the offeree, that is, has become effective at the time the offeree customarily checks his mailbox the next day, even if in fact he is ill and never looked in his mailbox that day. Offers and acceptances can be revoked until they have become effective, that is, until they have "reached" the offeree. Thus, if a revocation "reaches" the addressee prior to or simultaneously with the offer or the acceptance, then there is no effective offer or acceptance. If an offer is made in the presence of the offeree, he must accept it immediately. This is also true where the offer has been relayed by telephone. The late acceptance of an offer constitutes a new offer, and so is an acceptance which contains any addition to or variation from the offer.

An offer (provided it has become effective) is ordinarily binding; that is, it cannot be revoked during the period stipulated for its acceptance or, if no such time period is stipulated,

13. *Id.* § 128.

for a reasonable period of time after it reached the offeree. However, the rejection of the offer ends its binding effect. The binding effect of an offer also can be excluded by including in it express language that the offer is revocable (*widerruflich*) or is subject to change (*freibleibend*). In practice, such language is often included. Where it is included, there is no offer; there is really only an invitation to make an offer. Thus, there is really no offer when an "offer" is directed to a large number of addressees as in the case of newspaper ad, mail order catalog, or window display; there is only an invitation to make an offer.

It is not always necessary for the acceptance to reach the offeror. A contract is considered to have come into existence by the acceptance of the offer despite the fact that the acceptance has not been communicated to the offeror, provided: (1) such communication is not expected according to ordinary usage, or (2) the offeror has waived such communication.¹⁴ For example, a mail order house does not usually write to acknowledge receipt of an order (the offer), but instead ships the goods ordered. In this case, shipping the goods constitutes the acceptance of the offer. Nevertheless, except in a few very special situations, silence by itself does not constitute an acceptance.

A contract cannot come into existence unless both parties have agreed on all points concerning which, according to even one of the parties, there has to be an agreement. However, if the parties to a contract which they consider as having been concluded, in fact have not agreed on some point which they should have settled, there is nevertheless a valid contract if it appears that they would have made the contract even without settling that disputed point.

Unless a contrary intent on the part of the offeror may be inferred, the fact that either the offeror or offeree has died or become legally incompetent before acceptance does not in and of itself prevent the contract from coming into existence unless the contract requires performance of a personal nature. The heirs or guardian of the offeror are bound by the offer, as are the heirs of the guardian of the offeree.

14. *Id.* § 151.

The notion that a contract can legally come into existence only by an offer and acceptance which reflect the complete agreement of the parties is not necessarily consistent with modern realities. When a person uses public transportation or public utilities or even when he uses a parking place for his car, there is no offer and acceptance in the traditional sense because the rates are fixed. Nevertheless, a person who avails himself of such benefits is required to pay for them, even though German legal theorists have not yet agreed on the theoretical basis for such an obligation.

V. PERFORMANCE

A. PLACE OF PERFORMANCE (*LEISTUNGSSORT-ERFUELLUNGSSORT*)

Absent a provision in the contract, the place of habitual residence of the debtor or the debtor's place of business at the time the contract was concluded is the place of performance where the creditor must go and fetch what is due to him. To have the debtor perform at the habitual residence or place of business of the creditor requires the express consent of both sides. However, which party is to pay for the cost of transportation is not relevant in determining the place of performance.¹⁵ Where the debtor is obligated to provide the goods at the creditor's habitual residence or place of business, the debtor's obligation in German law is referred to as *Bringschulden*, but it is referred to as *Holschulden* where the creditor is obligated to fetch goods or money from the debtor¹⁶. In any event, virtually all standard form contracts include a provision which specifies the place of performance.

If the creditor is to fetch goods from the debtor's place, the creditor bears the risk of accidental loss or destruction from the time the goods are delivered to him.¹⁷ If the debtor is ready to deliver, but the creditor delays in fetching the goods,

15. *Id.* § 269.

16. The place of performance in the situations of *Bringschulden* and *Holschulden* must be distinguished from the *Erfolgssort*, the place of completion of performance when the debtor's obligation is to ship the goods to the creditor (*Schickschulden*).

17. See BGB §§ 446-447.

the creditor bears the risk even though they are still in the debtor's possession at the time of accidental loss or destruction.¹⁸ If the obligation to perform consists of a money obligation, the debtor must, at his own risk and expense, forward the money to the habitual residence or place of business of the creditor.

B. "CONFORMING PERFORMANCE"

If the parties to the contract fully perform in accordance with its terms or if the creditor accepts performance of something other than what was originally required as full performance, the contract and the obligation(s) created thereby are extinguished.

C. "NON-CONFORMING PERFORMANCE"

The Civil Code does not contain a *comprehensive* concept of breach of contract such as is recognized in Anglo-American Law. Nevertheless, German legal doctrine recognizes three types of breaches of contract (*Vertragsverletzungen*):

1. Delayed performance (*Verzug*) when performance is not rendered at the required time and the debtor is responsible for the delay;

2. Impossibility of performance (*Unmöglichkeit*) which arises *after* the contract was concluded; and

3. Positive violations of contractual duties (*positive Vertragsverletzungen*) which cover all performance not conforming to the terms of the contract which do not constitute delay, impossibility, nonexistence or disappearance of the basis of the contract, defects in title, or breaches of a warranty.¹⁹

A debtor is not responsible for a breach of contract in any of these three categories, unless his fault, that is, his inten-

18. In the case of *Schickschulden*, the creditor's risk has already begun by the time the goods are given to the carrier.

19. See *infra* Part VI.

tional or negligent conduct, caused the breach.²⁰ German law uses a standard of "adequate cause"²¹ to determine whether the debtor caused the breach. This standard resembles the concept of proximate cause in Anglo-American law, but without the limitation recognized in proximate cause (*cf. Hadley v. Baxendale*), namely that the risk must have been foreseeable.

Despite not being personally at fault, a debtor is vicariously liable in contract for intentional or negligent acts committed by his statutory representatives (*gesetzlicher Vertreter*) and by persons he employs in the performance of his contractual obligations (*Erfuellungsgehilfen*).²² Statutory representatives within the meaning of § 278 of the Civil Code are guardians of minors or of incompetents, trustees in bankruptcy, etc.. Persons employed in performing a debtor's obligations can be any member of the debtor's family, work force, or an independent third party. However, the debtor is only vicariously liable in contract for the intentional or negligent conduct of his statutory representative or of *Erfuellungsgehilfen* if such conduct occurred during their performance of the debtor's contractual obligation, but not for the intentional or negligent acts of such persons not committed during their performance of the debtor's contractual obligation. For example, A is contractually obligated to repair the roof of B's house. A sends C, his employee, to repair the roof, but C negligently repairs the roof so that it collapses and injures B's furniture. While C was repairing the roof, C managed to steal a painting from B's house. A is liable in contract for failing to repair the roof and for the resulting injury to B's furniture, but not for the theft of the painting because the theft was *not* committed in the performance of a contractual obligation owed by A (the debtor) to B.

It is important to remember that § 278 of the Civil Code applies only to contractual obligations; vicarious liability for the tortious conduct of one's employees is governed by § 831 of the Civil Code. Where the employee has violated a contractual obligation owed by his employer, the latter is liable in contract even though he used ordinary care in the selection and super-

20. BGB § 276(1).

21. See, e.g., *infra* Part V. D., E., and F.

22. BGB § 278.

vision of the employee; however, under § 831 the employer would not be vicariously liable for the tortious conduct of an employee if he used ordinary care in selecting and supervising his employee. Thus, considering the example in the previous paragraph, B would sue A for the unrepaired roof and damaged furniture for A's breach of *contract* rather than in *tort* because A would then be unable to exonerate himself by demonstrating that he used ordinary care in selecting and supervising the employee in question. Innkeepers, public railroads, and the postal services are vicariously liable for *all* acts of their employees committed within the scope of their employment which injure tangible property of their customers,²³ regardless of whether the employer used ordinary care in their selection and supervision.

D. DELAYED PERFORMANCE (*VERZUG*)

The fact that the debtor does not perform on time does not, in and of itself, constitute delayed performance. Delayed performance (*Verzug*) requires both of the following:

1. Unless the contract requires performance on a fixed date (that is, a date which can be precisely determined by the calendar) or the debtor has already expressly or impliedly refused to perform, performance is not considered due unless and until the debtor first has been expressly and unconditionally warned by the creditor that performance is due (*Mahnung*). However, if the debtor is required to perform on a fixed date, the creditor need not warn the debtor.

2. The debtor's fault must be responsible for the delayed performance; if the delay is caused by *force majeure* such as fire, storm, theft, transportation strikes, and the like, the debtor is not responsible for the delayed performance.²⁴

If the debtor is in *Verzug*, that is, his fault is responsible for the nonperformance despite the creditor's express and unconditional warning (*Mahnung*), then the debtor must provide

23. See *id.* § 701; Handelsgesetzbuch (HGB) (Commercial Code) § 454.

24. BGB §§ 284-285.

monetary compensation to the creditor for all harm attributable to the delayed performance. The creditor is entitled to such compensation in addition to having the debtor perform even if such performance is already rendered.²⁵ In Anglo-American terminology, the creditor in the case of *Verzug*, is entitled to specific performance of the contract, plus money damages for all harm resulting from the debtor's delayed performance.

If the debtor's *Verzug* has deprived the further performance of all value for the creditor, the creditor is entitled to refuse the debtor's performance. Instead, the creditor is entitled to claim loss of bargain; he is entitled to such monetary compensation for the debtor's nonperformance as will place him (the creditor) in the position he would have been in had the debtor fully and timely performed, provided he returns whatever benefits he may already have received from the debtor.²⁶ If the debtor is in default on a money debt, the debtor must pay interest at the rate of 4% (5% percent in commercial transactions) during the delay unless the parties had agreed on a higher rate of interest (which may not exceed a usurious rate, generally 12%).

If the debtor is already in *Verzug*, that is, the debtor's fault is responsible for the delayed performance of his part of a *reciprocal* contract (*Gegenseitiger Vertrag*),²⁷ the creditor may give the debtor an additional reasonable time to perform, declaring at the same time that after its expiration the debtor's performance will no longer be accepted. This additional period is referred to as a *Nachfrist* (subsequent period) because it can be allowed only after the debtor is already in *Verzug*. If the debtor fails to perform during the *Nachfrist* period, the creditor can no longer demand performance; he can only claim money damages (loss of bargain) for nonperformance or, in the alternative, can rescind the contract (*Ruecktritt*) which requires that the parties place each other as far as possible in the position they would have been in had the contract never been concluded. Of course, the creditor in any event and without afford-

25. *Id.* § 286(1).

26. *Id.* § 286(2).

27. See *infra* Part VI.A.

ing a *Nachfrist* is entitled to these two remedies where the debtor's delay deprived his performance of its value.²⁸ Nevertheless, creditors typically prefer monetary compensation over rescission.

Unless a contrary intent is expressed or implied in the transaction, if the debtor at the time of performance has a claim against the creditor which is then due and which arises out of the same transaction, the debtor has the right to withhold performance (*Zurueckbehaltungsrecht*).²⁹ For example, A is supposed to return a car he kept for B at a particular time, but A is to be reimbursed by B for expenses incurred while he cared for B's car. A need not return the car until B has paid for these expenses.

E. IMPOSSIBILITY OF PERFORMANCE

Under German law, impossibility (*Unmöglichkeit*) exists where performance is impossible for everyone, not just for the debtor. Where performance is impossible for the debtor only, the Civil Code uses the technical term *Unvermögen* (inability).³⁰ If a contract is already in existence, the debtor (except for *inability* in one type of situation discussed below) is excused for nonperformance not only for impossibility (*Unmöglichkeit*) but also for inability (*Unvermögen*).³¹

Inability or impossibility to perform is not confined to physical inability or impossibility. Where performance is still possible, but has become economically or otherwise so burdensome that for the creditor to insist on it would be a breach of good faith, then § 242 of the Civil Code³² excuses the debtor from performing. If the impossibility to perform is caused by the debtor's fault (his intentional or negligent conduct), the debtor must provide monetary compensation to the creditor for all harm resulting from the nonperformance.³³ The debtor has

28. See *supra* text following note 25.

29. BGB §§ 273, 320.

30. See *id.* §§ 275(2), 279, 297.

31. *Id.* § 275(1).

32. See *infra* text accompanying note 42.

33. BGB § 280.

the burden to prove that the impossibility is not due to his fault.³⁴

If a debtor has undertaken a generic obligation, his inability to perform is not excused. The following is an example. A debtor is obligated to deliver goods of a described class, *e.g.*, 500 barrels of fuel oil. A fire destroys the debtor's 500 barrels of fuel oil. The debtor must obtain 500 barrels of fuel oil on the open market, whatever the cost, unless the creditor's insistence on performance would be a breach of good faith within the meaning of § 242 of the Civil Code.

Where impossibility of performance affects a *reciprocal* contract,³⁵ the situation is more complex. The impossibility may be the result of the debtor's fault, the result of the creditor's fault, or neither's fault. Impossibility in this context means impossibility as well as the debtor's inability (except for the debtor's inability to perform a generic obligation):

1. If neither the debtor nor the creditor is responsible for the impossibility, both are excused from performing.³⁶ If one party has already performed, such performance can be reclaimed in accordance with the rules of unjust enrichment.³⁷

2. If the *creditor's* fault is responsible for the impossibility, the debtor is excused from performance but retains the right to demand the creditor's counterperformance minus whatever advantages he (the debtor) derived from not having to perform.³⁸

3. If the *debtor's* fault caused the impossibility, the creditor essentially has three choices:

34. *Id.* § 282.

35. *See infra* Part VI.A.

36. BGB § 323(1).

37. *Id.* § 323(3).

38. *Id.* § 324.

- a. The creditor can simply refuse to perform because each party to a reciprocal contract in any event may refuse to perform until the other party has performed;³⁹ or
- b. The creditor can rescind the contract;⁴⁰ or
- c. The creditor can claim monetary compensation for nonperformance.

Under this third alternative, the creditor has two options. One, the creditor can withhold his counterperformance. The creditor is then entitled to monetary compensation which equals the difference between the value which the debtor's performance would have had for him if the debtor had duly performed, less the value of the counterperformance which the creditor saved. The second option is that the creditor can perform his part of the contract, and is then entitled to monetary compensation equal to the total value of the debtor's performance, assuming the debtor had duly performed.⁴¹

Closely akin to and possibly overlapping with the notion of impossibility is the notion of the disappearance of the basis of the contract referred to in German law as the doctrine of *Fehlen* or *Wegfall der Geschäftsgrundlage* (nonexistence or disappearance of the basis of the transaction). This doctrine deals with the situation where both parties assumed that certain facts or circumstances existed which induced them to make the contract, but such facts and circumstances either did not exist or ceased to exist. If that is the case, either party to the contract is entitled to have his obligation modified or even totally excused if it would be unduly unfair to hold him to his original obligation. To require a debtor to perform under such circumstances is considered a violation of the creditor's obligation of good faith within the meaning of § 242 of the Civil Code.⁴² For example, A contracts to convey to B a valuable house for a certain sum of money six months after the conclusion of the contract. During this six month period, unforeseen

39. *Id.* § 320.

40. *See id.* §§ 323, 325.

41. *See id.*

42. *See supra* text accompanying note 32.

rampant inflation reduced the value of the purchase price to zero. A need not convey the house. It might be noted here that the doctrine of *Fehlen* or *Wegfall der Geschäftsgrundlage* resembles the doctrine of fundamental change in circumstances formerly known as "*rebus sic stantibus*" in international law as well as the Anglo-American doctrine of frustration of contracts.

F. IMPERFECT PERFORMANCE

If there are failures of performance which do not constitute (1) delayed performance, (2) impossibility or inability to perform, (3) *Fehlen* or *Wegfall der Geschäftsgrundlage* (non-existence or disappearance of the basis of the contract), or (4) breaches of a warranty of fitness or a title defect, they are called *positive Vertragsverletzungen* (positive violations of contractual duty). Because the Civil Code does not provide a remedy for irregular performance which does not fit within these four categories, German courts developed the customary law concept of *positive Vertragsverletzungen*. Under this concept, the creditor is entitled to monetary compensation for all injury or damage resulting from this residual category of irregular performance. Furthermore, if such irregular performance endangers the whole purpose of a reciprocal contract, the creditor can either rescind the contract or claim monetary compensation.

The category of positive breaches of contractual duty is rather broad and varied and no exhaustive definition can be given. Some examples are:

1. A machine is supplied without the instructions needed to operate it. When the machine is started, it causes substantial injury.
2. Heating oil is carelessly pumped into a drinking water tank.
3. A customer just purchased a roll of carpet, and while waiting for it to be wrapped, is injured by another roll of carpet which falls on her.

It should be noted here that many cases of positive breach of contractual duty are difficult to distinguish from cases where there could be tort liability.⁴³

G. CONTRACTUAL LIABILITY FOR IMPERFECT PERFORMANCE WITHOUT CONTRACT

As indicated previously, an employer is liable for a breach of his contractual obligation caused by the faulty performance of his employees, and such liability is considered to be based on the doctrine of *culpa in contrahendo* (fault in contracting). However, this doctrine has also been used to hold an employer vicariously liable *in contract* for the negligent or intentional conduct of an employee which occurred during the negotiations which were supposed to lead up to concluding a contract, but no contract ever came into existence. Because the employer is held liable *in contract*, he cannot exculpate himself on the ground that he used ordinary care in selecting and supervising the employee in question.

A famous 1911 case (RGZ 78, 239) provides an illustration. Unlike the customer in the third example in Section F, above, who had already concluded a contract (the purchase of a roll of carpet), in this case the customer was in a store shopping for a roll of linoleum. As the store clerk attempted to take out the roll pointed out by the customer, he moved two adjacent rolls which hit and injured the customer. Because of this injury, the customer did not purchase the roll of linoleum. Nevertheless, the *Reichsgericht*⁴⁴ awarded her monetary compensation for her injury on the ground that contractual standards of liability should be applied because the parties were on the way to concluding a contract. Because the customer went to the store to conclude a contract and relied on the store for her safety, the Court decided that the store should be liable *in contract* for its negligence occurring during the negotiations leading up to a contract, despite the fact that no contract was ever concluded. In short, *culpa in contrahendo* provided the basis for the store's liability to its customer. It should be noted that this

43. See *supra* Part V.C.

44. The predecessor of the *Bundesgerichtshof* (BGH), the court of last resort in both criminal and civil matters.

type of liability attaches as soon as a potential contracting party enters the premises of the other party.

H. CONTRACTUAL PENALTIES

A penalty clause (*Vertragsstrafe*) in a contract which provides that in case the debtor does not perform, does not perform on time, or does not perform properly, he then must pay a monetary penalty or do something in lieu of paying a monetary penalty, is legally valid.

A penalty may be claimed by the creditor, even though the creditor suffered no injury provided, of course, that the debtor's fault is responsible for the nonperformance, delayed performance, or improper performance.⁴⁵

On application of the debtor, a monetary or other type of penalty will be reduced by the court to a reasonable level if it finds that the penalty is disproportionately high, taking into consideration all legitimate interests of the creditor, not merely the creditor's economic interests. However, once the penalty is paid, a court is not entitled to reduce it.⁴⁶ In addition, a court cannot reduce a penalty, if a contractual penalty is agreed to by a merchant in the course of his business.

Where the penalty is promised because of the debtor's nonperformance, the creditor can either claim the penalty or demand that the debtor perform, but not both. Where the debtor does not perform in a timely or proper manner, the creditor is entitled to the penalty *in addition* to proper or timely performance.

I. DISCLAIMER CLAUSES

The general rule of the Civil Code is that an exculpatory or disclaimer clause is valid as long as it does not exclude liability derived from one's intentional or negligent conduct or

45. See BGB §§ 339, 285.

46. *Id.* § 343.

such conduct of one's employees or agents.⁴⁷ Nevertheless, by virtue of the Standard Terms Act of 1976 (*Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen*), disclaimer or exculpatory clauses included in standardized consumer contracts, as well as in other types of standardized adhesion contracts, are generally invalid if they put the economically weaker party at an unfair disadvantage.

J. RESCISSION

Although apparently rarely done, instead of an exculpatory or disclaimer clause, a contracting party could include in the contract a clause which provides that he reserves the right to rescind the contract (*Ruecktritt vom Vertrag*). The exercise of this right terminates the contract and substitutes an obligation to make restitution. As far as possible, each party must place the other party into the position he was in before the contract was entered into. In addition to being reserved in the contract, the right to rescind can (and often does) arise by operation of law as one of the remedies the innocent party can elect when the other party is in default of his contractual obligations. Although the provisions of the Civil Code (§§ 346-361) only govern the situation where the right to rescind was reserved in the contract, they are also analogously applied when the right to rescission arises by operation of law.

Once the right to rescind comes into existence, either by declaration of the party which reserved the right in the contract or by operation of law, the contracting parties are obligated to return the benefits received from the other party without delay (*Zug um Zug*).⁴⁸ The rescission only affects the contract, not property which was transferred as a consequence of the contract. However, each party has a contractual claim for the retransfer of whatever property the other had already received. If services or the use of a thing were received by the rescinding party, such party shall compensate the other for the value of the services or the use of the thing. If money was received, it

47. *Id.* §§ 276, 278.

48. *Id.* § 348.

must be repaid with interest starting from the time of its receipt.⁴⁹

Special problems occur when the benefit to be returned consists of an object which was damaged, destroyed, or lost in some other way due to the fault of the contracting party obligated to return it. If the right of rescission was exercised on the basis of a clause in the contract, then the party obligated to return the object is required to compensate the rescinding party for all destruction, damage, or losses which occurred since he received the object; but, the former is entitled to reimbursement for expenses he incurred in maintaining it. If the object bore any fruit during this period, he must also transfer such fruits to the rescinding party. However, if the right of rescission arose by operation of law, the debtor's obligation to the creditor comes into existence at the time the debtor becomes aware of the creditor's right to rescind the contract.

The rescinding party is not prevented from exercising his right by the fact that the object which he had received from the other party has been accidentally destroyed. However, if the party entitled to rescind the contract is responsible for any significant deterioration, destruction, or loss of the object which he had received from the other party, or if he is responsible for changing the form of the object received (*e.g.*, by processing or changing into an object of another kind), then his right to rescind is barred.

VI. TYPES OF CONTRACTS

A. RECIPROCAL CONTRACTS (*GEGENSEITIGE VERTRAEGE*)

Although not included in Section VII of Book Two of the Civil Code which contains the provisions governing the special types of contracts recognized by the Civil Code, there are a number of provisions in Section II of Book Two which deal with an important group of contracts, namely reciprocal contracts. Reciprocal contracts are contracts in which it is the intention of the parties that the performance of each party is

49. *Id.* §§ 346-347.

the equivalent of and dependent upon the performance of the other party (parties). A typical example of a reciprocal contract would be a sales contract, *e.g.*, 10,000 DM for the purchase of a used automobile. This is considered a reciprocal contract because the performance of the seller (the transfer of ownership of the used automobile) is intended to be the equivalent of and dependent on the payment of the 10,000 DM regardless of whether or not the purchase price is equivalent to the market value of the used car. On the other hand, a loan contract where the loan proceeds have been paid to the borrower is not a reciprocal contract. At that stage, the lender is under no obligation to perform. Only the borrower is under an obligation to perform; he must repay the principal and whatever interest is required to be paid.

As indicated in previous sections, when a party's fault is responsible for a breach of contract, there are special rules when the contract in question is a reciprocal contract. If the contract is reciprocal, each party may refuse to perform until the other party performs, unless the contract expressly requires the former to perform first.⁵⁰ However, if one party (the plaintiff) seeks to have the other party's (the defendant's) performance judicially enforced, the plaintiff must demonstrate that he (the plaintiff) has performed. If the defendant can show that the plaintiff *failed* to perform, the action will not be dismissed, but a judgment will be entered requiring the defendant to perform contemporaneously with the plaintiff's performance.⁵¹

If the reciprocal contract requires the plaintiff to perform first but the defendant without good cause refuses to accept the plaintiff's performance, the plaintiff may bring his action to compel the defendant to perform after he (the plaintiff) has received the defendant's performance.⁵² In addition, if one party is obligated to perform first but there has been a significant deterioration in the financial position of the other party,

50. *See id.* § 320.

51. *Id.* § 322.

52. *Id.*

the former may refuse to perform until the latter has either performed or provided security for performance.⁵³

B. THIRD PARTY CONTRACTS

Contracts for the benefit of a third party (*Vertraege zugunsten Dritter*) are valid and are often made.⁵⁴ The contract may expressly provide for performance in favor of a third party as well as give the third party the right to demand such performance. However, it is not necessary expressly to provide in the contract that a third party has the right to its performance. It can be inferred from the circumstances, especially from the purpose of the contract; whether the third party acquired the right to demand performance; whether this right is to accrue immediately or only under certain conditions; and whether the contracting parties reserved the right to take away or modify the third party's right to demand performance. The third party may reject the right he acquired under the contract by declaration to the promisor.⁵⁵ The promisor can assert defenses arising from the contract even against the third party.⁵⁶ If a third party is entitled to demand performance, such performance may be demanded by the third party as well as by the promisee; however, the promisee may only demand that performance be rendered to the third party.⁵⁷

C. SPECIAL TYPES OF CONTRACTS: INTRODUCTION

Section VII of Book Two of the Civil Code, §§ 433-853, called Particular Obligations (*Einzelne Schuldverhaeltnisse*) includes §§ 433-808(a) which list the special types of contracts (sale, gift, lease, etc.) recognized and governed by the Code. The special types of contracts (just like contracts in general) are subject to: (1) all the general rules contained in Book One of the Civil Code (§§ 1-240) which apply to all relations and transactions governed by private law unless a different rule is required for a particular type of transaction, and (2) to all the

53. *Id.* § 321.

54. *Id.* § 328.

55. *Id.* § 333.

56. *Id.* § 334.

57. *Id.* § 335.

rules contained in Book Two of the Civil Code (§§ 241-432) which apply (a) to obligations in general, whatever their source (that is, tort, contract, etc.); and (b) to the rules applicable to contracts generally⁵⁸ which govern all special types of contracts, unless Section VII of Book Two of the Code requires a different rule for the special type of contract in question or unless the parties are allowed to and displace such rules by their agreement.

Because the types of contract listed are not mandatory, parties can enter into contracts which are totally different from the types listed in Section VII of Book Two as well as combine parts taken from the various types, called mixed or hybrid contracts. An example of the latter would be a lodging contract with a hotel. Such a contract contains elements of a lease (*Mietvertrag*) for the room itself, a contract for service (*Werkvertrag*) for cleaning the room, and a sales contract (*Kaufvertrag*) for furnishing breakfast.

Because the special types of contracts enumerated in Section VII are often not suitable for many kinds of modern activities, parties often enter into new types of special contracts created by the courts and legal scholars, e.g., a *Sicherungsuebereignungsvertrag*, a contract which creates a security interest for creditors.⁵⁹ As a rule, each part of a hybrid contract is governed by the rules governing the type of contract from which the part was taken. In the above example, the rules governing leases apply to the room, those for contracts for service apply to cleaning the room, and those governing sales contracts apply to furnishing breakfast. However, if a hybrid contract predominantly resembles a particular type of contract listed in Section VII of Book Two, then the rules governing that special type of contract govern the entire hybrid contract.

58. See *supra* Parts I, II.

59. See *infra* text accompanying note 111.

D. SALES CONTRACT (*KAUFVERTRAG*)

1. In General

The literal translation of the term *Kaufvertrag* is purchase contract. In German law, a *Kaufvertrag* is a reciprocal contract which obligates the seller to transfer the ownership of the subject matter of the sale in exchange for the purchase price, and which obligates the buyer to pay the purchase price and accept the transfer of ownership of the subject matter of the sale. If the buyer's counterperformance consists of something other than the payment of money, the transaction is not a sale but, a *Tausch*, an exchange, and the rules governing sales contract apply *mutatis mutandis*. Furthermore, the sales contract does not itself convey ownership of that which is sold; that requires a separate transaction, namely delivery of possession of the object or a documented conveyance.⁶⁰

The special rules governing sales contracts and exchanges are found in Book Two, Section VII, Title I, §§ 433-515. However, if *all* parties to the sales transaction are merchants, §§ 373-382 of the Commercial Code (HGB) will apply. It should also be kept in mind that standard form contracts predominate in the field of sales contracts; such form contracts are valid provided their content complies with the law, particularly the Law on Standard Conditions of Business (AGBG).

2. Subject Matter of Sales Contracts

The subject matter of a sales contract can be a thing, which includes the whole range of personal and real property; a right, including debts; all other claims arising out of obligations, patents, shares of stock, and partnership shares; and the like. In addition to things and rights, practically anything which has economic value may be sold, such as heat, electricity, "know-how," a law or medical practice, or even an aggregate or complex of things and rights, such as a business. However, as mentioned above, the sales contract (*Kaufvertrag*) does not itself transfer ownership; the seller is obligated to invest the

60. See Book Three of the Civil Code.

buyer with possession and ownership by a separate and independent transaction. The Civil Code prescribes different methods depending on the subject matter which is being transferred. If real property rights are involved, a notarial document and its recording in the Land Register are required. Other rights can be transferred by mutual agreement (*Einigung*). An aggregate or complex of things and rights, although it can constitute the subject matter of a single sales contract, nevertheless requires that each component be transferred by the method required by the Civil Code for its transfer. The costs of transfers are generally borne by the seller.⁶¹

3. Special Rules Applicable to Sales Contracts

a. Risk of loss or injury

The burden and benefits of the subject matter which has been sold pass to the buyer at the time the risk passes to him, and the risk passes when *possession* of the object is delivered to the buyer (which does not necessarily coincide with the transfer of ownership).⁶² Nevertheless, in the case of real property or registered ships the risk passes to the buyer either when possession is transferred or when the transaction is recorded in the land (or ships') register, whichever is earlier.⁶³

If, at the buyer's request, the seller ships the goods sold to a place other than the place of performance, the risk passes to the buyer as soon as the seller has delivered the goods to the carrier or other entity designated to handle the shipment. If the seller has expressly or impliedly agreed to deliver the goods to the buyer's habitual residence or place of business, then the seller bears the risk until the goods are delivered there. If the buyer has issued special shipping instructions, but the seller deviates from such instructions without an urgent reason, the seller is responsible to the buyer for all the harm resulting from the deviation. Of course, consistent with their freedom of contract, the parties may stipulate that the risk passes at whatever time they want.

61. See BGB § 448.

62. *Id.* § 466(1).

63. *Id.* § (2).

b. Defect in title (*Rechtsmangel*)

The seller warrants that he has title to that which he contracted to sell (whether tangible things or rights); he is generally obligated to make the buyer the owner of the subject matter sold and make sure that it is free from liens or encumbrances.⁶⁴ However, unless otherwise agreed, the seller of personal property is not responsible for defects of title known to the buyer at the time of sale.⁶⁵ In the case of real property, the seller must have all liens and encumbrances extinguished even if the buyer knew of them at the time of sale. For the sale of rights (intangibles), the seller only warrants that the right (claim) exists, but not that the debtor is solvent.

If there is a title defect for which the seller is responsible, the buyer can insist that the seller remove it and that ownership is transferred free and clear. In the alternative, the buyer can:

1. Treat the title defect as a defense to the seller's claim for payment;
2. Rescind the contract; or
3. Claim monetary compensation for nonperformance of the contract which is not to exceed the actual harm suffered by him because of the title defect.⁶⁶

The buyer is entitled to claim any one of these three remedies even if the seller was not at fault or not responsible for the title defect; the seller is liable because of the warranty of title implied in the sales contract. Nevertheless, in the case of the sale of personal property, the buyer can claim monetary compensation only if the rights of a third party have deprived him of such personal property, a vestige of the Roman Law principle of eviction. On the other hand, despite the existence of a title defect, if the buyer by *bona fide* purchase obtains full

64. *Id.* § 433.

65. *Id.* § 439(1).

66. *See id.* §§ 323-326, 440(2)-(4).

and unencumbered ownership, then the sales contract is considered completely performed.

c. Defects in quality

The seller of goods warrants (*gewaehrleistet*) that they are of the quality expressly or impliedly called for by the sales contract.⁶⁷ If at the time the risk of loss passes to the buyer there is a defect in the goods which adversely affects their value or their fitness for ordinary use or for the use called for in the contract, then the seller has breached this warranty.

A seller is not responsible for defects in the goods sold if, at the time the contract was concluded, the buyer knew of the defect.⁶⁸ However, if a buyer remains ignorant of a defect because of his (the buyer's) gross negligence, then the seller is responsible for such defect only if he (the seller) had fraudulently concealed the defect or had guaranteed that the goods would be free of defects.⁶⁹ A seller is also not liable for defects in pledged goods sold at public auction to satisfy the pledgor's indebtedness to the seller or if goods are sold at public auction pursuant to court order.⁷⁰ If the buyer discovers that the goods have a defect before they are tendered and thus before the risk of loss passes to him, he may refuse to accept delivery of such goods. There are special rules for the sale of horses and other livestock. Generally, the seller is only liable for certain major defects in the animals, provided they become apparent within certain time periods.⁷¹

If both the buyer and seller are merchants, and the sale is thus considered a commercial transaction, the buyer must inspect the goods immediately upon arrival and promptly notify the seller if the wrong quantity of goods were delivered, or if there were defects in the goods delivered; if the buyer fails to

67. *Id.* § 459.

68. *Id.* § 460(1).

69. *Id.* § 460(2).

70. *See id.* § 461 and § 806 Code of Civil Procedure, *Zivilprozessordnung* (ZPO).

71. BGB §§ 481-493.

do so promptly, he loses all his rights based on such irregular performance.⁷²

If the seller is at fault or responsible for the defect in quality, the buyer has two remedies unless he knew of the defect but nevertheless accepted the goods without reserving his rights on account of the defect. He can: (1) rescind the contract, that is, return the defective goods and have the purchase price returned to him (*Wandlung*); or (2) demand that the purchase price be reduced (*Minderung*) by an amount equal to the difference between the agreed purchase price and the value of the defective goods.⁷³ If the defective goods which were delivered were fungible (goods customarily ascertained by number, measure, or weight), then the buyer, instead of electing either rescission or price reduction, can return the defective fungibles and demand delivery of nondefective fungibles.⁷⁴

If a quality guaranteed by the seller in the contract is absent (even if not due to the seller's fault), or if the seller intentionally remains silent about a defect in the goods (an active act of concealment is not required), then the buyer, instead of rescinding the contract, having the purchase price reduced, or having nondefective fungibles delivered, has a fourth option, namely refuse to accept the seller's performance and instead demand monetary compensation for nonperformance.⁷⁵ Such compensation is intended to put the buyer in the position he would have been in had the buyer duly performed. This result can be attained in two different ways. One, the buyer can retain the goods and demand from the seller the difference between the value the goods would have had if the seller had properly performed less the value of the defective goods retained (such difference could sometimes actually exceed the purchase price). Two, the seller can return the defective goods and demand monetary compensation equal to the value the goods would have had if the seller had duly performed. If the buyer knew of the defect, but accepted the goods without reserving his rights on account of the defect, the buyer

72. See *id.* §§ 373-378.

73. *Id.* § 462.

74. *Id.* § 480(1).

75. See *id.* §§ 463, 480(2).

is not entitled to any of the above discussed remedies. If the buyer agreed in the contract to limit his rights on account of defects to having the seller replace defective parts or components, then the buyer also cannot assert any of these remedies.

If a buyer claims monetary compensation not merely to make up for the defect in the goods sold but also for other harm done by the defective goods, the seller has been held liable for such consequential harm (*Mangelfolgeschaden*). For example, in one case a seller guaranteed that certain goods were fit for a particular purpose (that is, the adhesive sold was suitable to affix ceiling tiles), but the ceiling tiles fell despite the buyer using the adhesive as instructed, causing extensive damage to the buyer's premises. The seller was held liable for such consequential harm in addition to having to return the purchase price of the adhesive.⁷⁶

d. Time limits on bringing a lawsuit

Unless extended by the agreement of the parties, the buyer of personal property or intangibles must bring an action to enforce his rights within six (6) months from the time that the subject matter of the sales contract was delivered to him; in the case of sales contracts involving real property, the limitation period is one year after its transfer. However, if the seller intentionally concealed a defect, the buyer has 30 years (the ordinary time limit on all claims) from the time of transfer of the property, whether real or personal, to bring his legal action.⁷⁷ If the buyer has not yet paid the purchase price, a defense based on a defect in real or personal property can be interposed by the buyer whenever the seller sues, provided the buyer notified the seller of the defect before the end of the applicable time limitation - six months, a year, or 30 years as the case may be.

76. See BGHZ 50, 200.

77. See BGB §§ 195, 477.

e. Installment sales contracts

The Civil Code does not govern installment sales contracts (*Abzahlungsgeschäfte*). The Law of 16 May 1894 (hereinafter AbzG),⁷⁸ a frequently amended special statute, was enacted in order to protect the economically weaker party to the installment sales contract, the consumer. The law greatly restricts the freedom of contract of the parties because its provisions cannot be displaced by them; however, the AbzG does not apply if the buyer is registered as a merchant in the Commercial Register.

The AbzG requires that installment sales contracts must be in writing and clearly state what the effective yearly interest rate is. For seven days after the contract has been concluded, the buyer has the absolute right to revoke the contract without having to give any reasons, and the buyer must be informed of his right of revocation and the time period within which it can be exercised; otherwise, the buyer has seven days after the payment of the final installment to exercise his right of revocation. In addition, since May 1, 1986, the *Haustuerwiderrufsgesetz* (Law on the Revocation of Doorstep Transactions) guarantees the buyer who acquires something at his front door (where he is frequently taken by surprise and cheated) or on excursions arranged for the express purpose of selling certain products, a right to revoke the transaction. Contract clauses purporting to forfeit payments already made are invalid. If the seller repossesses the goods, (typically, pursuant to his reserved right of ownership), such repossession is treated as a rescission of the contract and the seller must pay back all the payments he has received;⁷⁹ however, the seller may deduct from such repayments his reasonable expenses as well as reasonable contractual penalties.

Attempts have been made to evade the AbzG, *e.g.*, by splitting the installment sales transaction into two separate contracts: (1) the sales contract between the buyer and seller, and (2) the financing contract between a financial institution (typi-

78. AbzG was replaced on 1 January 1991, by the Consumer Credits Law, *Verbraucherkreditgesetz*.

79. See *supra* Part V.J.

cally a bank) which extends credit to the buyer. Nevertheless, the German courts tend to deal with separate contracts intended as a substitute for a single installment sales contract as though there is only one single installment sales contract; thus, the courts apply all the rules of the AbzG, including the requirement of a writing, the right of revocation, the rights following upon rescission of the contract, *etc.*, to all such transactions despite the fact that a financial institution has been interposed between the installment buyer and seller. In any event, such a financial institution is subjected to all the defenses which an installment buyer can interpose against an installment seller. It might be noted that this German court-created rule is very similar to the rule prevailing in the United States.⁸⁰

E. GIFT (INTER VIVOS DONATION) (*SCHENKUNG*)

In German law, a gift (an *inter vivos* donation) occurs when one person (the donor) transfers something of value from his assets to enrich another (the donee), provided both agree that the donee need not compensate the donor for that which was transferred. Thus, a gift requires that the assets of the donor are diminished and those of the donee are enriched without the donee being required to compensate the donor. However, it is noteworthy that for German tax purposes the concept of gift is considerably broader than that of the Civil Code.

A gift does not have to comply with any formalities if the subject matter is manually transferred (*Handschenkung*); but, a promise to make a gift is legally enforceable only if it is made in writing and is notarized or judicially authenticated. Of course, if the donor fully performs his oral promise to make a gift, the gift is perfectly valid despite the fact that his promise was not in the form of a notarized or judicially authenticated writing and that there was no consideration for the promise. If a donor intentionally conceals a defect in title or in the quality of the subject matter of the gift, the donor must compensate

80. It should be noted that the court-created rules described in this section have now been codified in the Consumer Credits Law (*Verbraucher kreditgesetz*), entered into force, 1 January 1991.

the donee for all damage resulting from such concealment despite the fact that the donor received no consideration.

A donor is entitled to refuse fulfillment of a gratuitous promise to make a gift (even a notarially or judicially authenticated promise) if fulfilling it would endanger the reasonable means for his or his dependents' support. If there is such danger, the donor is even entitled to recall the gift.⁸¹ A completed gift can also be revoked by the donor if the donee is guilty of serious misconduct against the donor or close relatives of the donor. Nevertheless, if a gift was made in compliance with a moral obligation or in accordance with notions of common decency, the donor is not entitled to recall or revoke the gift.⁸² If a gift is linked with a burden (e.g., the care of a grave), the donor is entitled to have the burden carried out if he has executed the gift.

F. LEASES

1. Ordinary Lease (*Mietvertrag*)

A lease is a contract which obligates the lessor to relinquish possession of the subject matter to the lessee in exchange for the agreed-upon rent. Real as well as personal property can be leased. Only leases of parcels of real estate, living accommodations (such as apartments or rooms) or rentals of business premises must be in writing if the lease runs for more than one year; however, if such leases are not in writing, they are deemed to have been made for an indeterminate time period and they may not be terminated by notice given prior to the end of the first year of the term of the lease.⁸³

The lessor is required to insure that the lessee will have the undisturbed use of the subject matter of the lease during the entire term of the lease.⁸⁴ Secondly, the lessor warrants that the subject matter of the lease (whether real or personal property) is in a condition fit for the use stipulated in the con-

81. BGB §§ 519, 528.

82. *Id.* § 534.

83. *Id.* § 566.

84. *Id.* § 535.

tract; and, lastly, the lessor warrants that he will maintain the leased subject matter in this condition during the entire term of the lease.⁸⁵

If a defect which destroys or significantly reduces the stipulated fitness of the lease's subject matter was in existence at the time the lease was concluded, or arose subsequently because of something for which the lessor is responsible, then the lessee is entitled to withhold all or part of the payment of the rent depending on the extent to which the value of the lease has been diminished. If there are such defects but the lessor, after notification, fails to cure them, then the lessee, in addition to withholding an appropriate part of the rent, is entitled to monetary compensation which equals the value of the lease without such defects and its reduced value because of such defects. The lessee also has the right to reduce the rent and obtain compensation from the lessor if a warranted quality in the subject matter of the lease is absent or subsequently disappears.⁸⁶ Instead of demanding monetary compensation for the lessor's failure to cure a defect or missing warranted quality, the lessee has the option to cure them himself and recoup the cost from the lessor.⁸⁷

The rules governing defects in the subject matter of the lease also apply to defects in the lessor's title which result in disturbing the lessee's possession of the leased subject matter.⁸⁸ In addition to these remedies, a lessee in possession in his capacity as a possessor is entitled to utilize the remedies which the Civil Code provides to a possessor when he is disturbed in his possession.⁸⁹

A lessee is not entitled to any relief if: (1) he knew of physical or title defects, (2) because of his own gross negligence he failed to ascertain such defects, or (3) he waived the defect (unless the lessor fraudulently concealed the defect or had

85. *Id.* § 563.

86. *Id.* § 537.

87. *Id.* § 538.

88. *Id.* § 541.

89. *See id.* §§ 854, *et seq.*

expressly warranted its absence).⁹⁰ Nevertheless, the lessee of living accommodations, the use of which would entail danger to life, is entitled to terminate the lease without giving prior notice even if he knew of the dangerous condition or had expressly waived such right in the contract.⁹¹

If, during the term of the lease, the lessee discovers a defect in the leased subject matter, or a defect in the lessor's title, or if precautions become necessary to protect the leased subject matter against unforeseen dangers, he is obligated to inform the lessor thereof without delay. If the lessee fails to do so, he must compensate the lessor for all damage resulting from such failure. Where the lessee's failure to notify prevented the lessor from curing the defect, then the lessee is not entitled to receive compensation for the defect, reduce the rent, or summarily terminate the lease.⁹²

Unless otherwise agreed to in the contract, the lessee is not responsible for alterations of or deteriorations in the leased subject matter which result from the stipulated use, and a lessee is ordinarily entitled to remove fixtures attached to the subject matter of the lease. The lessor must pay all public charges (*Lasten*) imposed on the subject matter of the lease as well as reimburse the lessee for necessary maintenance expenses. A lessee of an animal must bear the cost of fodder. After the termination of the lease, the lessee must return its subject matter to the lessor.⁹³

If the lessee persists in using the leased subject matter in violation of provisions in the contract despite a warning from the lessor, the lessor can: (1) sue to enjoin such violations, (2) terminate the lease without giving prior notice, or (3) obtain monetary compensation from the lessee for the latter's breach of this obligation.⁹⁴

90. *Id.* § 539.

91. *Id.* § 544.

92. *Id.* § 545.

93. *See id.* §§ 546, 547-547a, 548, 556.

94. *See id.* §§ 550, 553.

2. Sublease (*Untermiete*)

A sublease of all or part of the leased subject matter requires the permission of the lessor. In the case of living accommodations, if after the conclusion of the lease the lessee has a legitimate interest to sublet part of the leased premises, the lessor may not unreasonably withhold permission; however, the lessor is entitled to a rent increase based on the increased use.⁹⁵ A lessor of a living accommodation is not allowed to object to the lessee sharing the leased premises with a spouse or other relatives. The relationship between the lessee and the sublessee is governed by the rules governing leases.

There is no direct legal relationship between the lessor and the sublessee(s); instead, the lessee remains liable to the lessor for any fault of the sublessee in the use of the subleased subject matter. Upon the termination of the principal lease, the lessor can require the sublessee to relinquish his rights under the sublease even though the lessor consented to the sublease.

3. Payment of Rent

Section 551 of the Civil Code provides that rent is payable at the end of the term of the lease or, if rent is payable periodically, the rent is payable at the end of each period. Real property rental payments are payable on the first business day following the end of each calendar quarter unless rent is payable in shorter periods than a calendar quarter. In any event, in real property leases and in leases of apartments or rooms, the provisions of § 551 are typically displaced by the provisions agreed to by the parties. To secure his claims for rent for the current year and the year following, the lessor of real property, or of an apartment or a room, has a statutory lien (pledge) with respect to all personal property brought unto the leased premises by the lessee.⁹⁶

95. *Id.* §§ 549(1)-(2).

96. *Id.* § 559.

4. Assignment of Lease

If the ownership of real property subject to a lease is transferred to a third party, the lease is not terminated; the transferee assumes all the rights and obligations of the lessor (*Kauf bricht nicht Miete*).⁹⁷ However, the transferor remains personally liable to the lessee if the transferee fails to fulfill his assumed obligations. Nevertheless, the transferor is released from such personal liability to the lessee if he notified the lessee of the transfer of ownership but the lessee subsequently failed to terminate the lease by giving proper notice of termination.⁹⁸

5. Termination of Lease: Overview

If the parties concluded the lease for a particular time period, the lease expires at the end of such period. If the lease does not contain a provision for its termination, the lease continues for an indefinite period. A lease for an indefinite period can be terminated by *both* sides agreeing to terminate it or by *one* side giving proper notice to terminate.⁹⁹ A notice of termination of a lease of *living accommodations*, other than furnished single rooms or temporary living accommodations, must be in writing and set forth the landlord's reasons for giving notice of termination. In addition, the landlord's notice must apprise the lessee that he has the right to oppose the termination of such a lease under certain circumstances.¹⁰⁰ The lessee's right to oppose termination is contained in § 556(a) of the Civil Code, a so-called "hardship" provision, which gives a long-term lessee of living accommodations (a lessee for an indefinite period or for a long fixed period) the right to demand in writing the continuation of the lease if, considering all relevant circumstances, its termination would create an unjustified hardship for the lessee or his family. In any event, the landlord of *living accommodations* for an indefinite term is only entitled to terminate the lease if he has a justified interest in terminating it, *e.g.*, if he needs to use the leased premises for

97. The sale does not break the lease.

98. See *infra* Part VI.F.5-7.

99. BGB § 564.

100. *Id.* § 564(a).

himself, needs to make an appropriate use of the premises so as not to be seriously economically disadvantaged, or if the lessee materially breached provisions of the lease, *etc.*. If the lessor occupies one unit in a two-unit building, or if the lease is for living accommodations within the lessor's own home, temporary living accommodations, or furnished single rooms, the lessor does not need to have a justified interest in terminating the lease. Of course, even in these situations, the lessee retains his right under § 556(a) of the Civil Code to oppose the termination of the lease because it will create an unjustifiable hardship for him or his family.

6. Ordinary Termination

Leases of indefinite duration are terminated by giving prior notice generally equaling the time period for which periodic rental payments are required to be made. The notice terminating a lease of *living accommodations* must be given no later than the third business day of a calendar month, to take effect at the end of the second month following that calendar month, *e.g.*, a notice to be effective March 31st must be given on January 3rd. After a lease for living accommodations has been in existence for 5, 8, and 10 years, the notice period is extended each time by three months. Leases of furnished rooms or of temporary furnished living quarters can be terminated on relatively short notice. For example, if rent for such premises is payable monthly, notice of termination given by the middle of the month, and to be effective at the end of the same month, is valid. Once a lease has been terminated, the lessee must surrender to the lessor the subject matter of the lease and, in the case of living accommodations, vacate the premises.

7. Extraordinary Termination

Only in the following situations can a lease be terminated by notice effective immediately. First, if the lessee, notwithstanding the lessor's warning, persists in using the leased subject matter contrary to the stipulated use, which seriously impairs the lessor's rights, the *lessor* can give notice terminating the lease immediately. Furthermore, a *lessor* can terminate the lease effective immediately if the lessee defaults on two

successive rental payments or defaulted on two rental payments during any longer period. A *lessee* is entitled to give notice terminating the lease immediately if the subject matter of the lease is not suitable in whole or in part for the use stipulated in the lease contract and the lessor has failed to remedy the problem within a reasonable time period fixed by the lessor.¹⁰¹

8. Additional Special Rules for Leases of Living Accommodations

Because of the continuing housing shortage, there are a host of special rules which apply when dealing with leases of living accommodations. Prominent among these is the Law Regulating Maximum Rent (*Gesetz zur Regelung der Miethöhe* (MGRG)) of December 18, 1974, (since amended) which prohibits terminating a lease in order to obtain a higher rent, but which permits the landlord to obtain a higher or graduated higher rent if he can justify it in specified circumstances. This law protecting tenants also typically invalidates provisions which disadvantage tenants. However, tenants must generally tolerate measures undertaken by the landlord for the maintenance, improvement, and modernization of the premises, as well as work performed to save heating energy.¹⁰² Tenants cannot be required to give the landlord a security deposit to guarantee the payment of rent in excess of three months rent. The landlord must put these security deposits in a special account, separate from his own, which is required to earn interest at the rate usual for savings accounts. The interest on the security deposit belongs to the tenant. Finally, it should be noted that there are special rules for youth and student living accommodations,¹⁰³ as well as for living accommodations located in the area of the Former German Democratic Republic (DDR).¹⁰⁴

101. *Id.* § 542.

102. *See id.* §§ 541(a)-(b).

103. *See id.* §§ 550(b), 564(b); MGRG § 10.

104. *See* MHRG § 11.

9. Leasing Agreement (*Leasingvertrag*)

A variation of an ordinary lease is the leasing agreement (*Leasingvertrag*) pursuant to which the lessee, as in the case of a contract of sale, carries the risk of injury, loss, destruction, and maintenance for the reason that the lease payments are based not on the value of the use of the leased subject matter but on its intrinsic value. Often the "leasing agreement" contains an option to buy pursuant to which the lessee, by unilateral declaration, can retroactively convert the "leasing agreement" into a sales contract and have the rental payments applied to the purchase price.

10. Usufructuary Lease (*Pachtvertrag*)

The *Pachtvertrag* (usufructuary lease) is a reciprocal contract which obligates the lessor (*Verpachter*) to permit the lessee (*Pächter*), in consideration for the agreed rent, to use the leased subject matter and to enjoy the fruits produced by its proper utilization. The usufructuary lease differs from an ordinary lease in that tangible objects as well as rights (e.g., patent rights) can be leased. The most significant difference is that it permits the lessee not merely to use the leased subject matter (e.g., a farm), but also to reap its fruits as well (e.g., to harvest its crop).

Usufructuary leases are subject to the rules governing ordinary leases to the extent that such rules are capable of being applied to usufructory leases. Usufructuary leases of agricultural land are, in addition, subject to certain specialized rules found in §§ 585 *et seq.* of the Civil Code, in the *Landpachtverkehrsgesetz* (Law Concerning Transactions in Usufructuary Leases of Agricultural Land) of November 8, 1985, and in the Law Concerning Judicial Procedure in Agricultural Land Matters of July 21, 1953. Usufructuary leases of small garden plots (*Schrebergärten*) are subject to the rules found in a special federal statute of February 28, 1983, as amended on December 8, 1986.¹⁰⁵ Usufructuary leases of

105. See 1983 Federal Gazette, Vol. I, p. 210; 1986 Federal Gazette Vol. I, p. 2233.

hunting rights are governed by a federal statute (BJagdG - Federal Hunting Law) and by implementing state (*Land*) legislation. The lessor has a statutory lien on all tangible property which the lessee brings unto the leased premises to secure present as well as future rental payments; in the case of rural land, the lessor's lien also applies to its fruits and to agricultural fixtures brought unto the land by the lessee.

G. GRATUITOUS LOANS (*LEIHE*), SECTIONS 598-606 OF THE CIVIL CODE

A gratuitous loan is a contract which obligates the lender to permit the borrower gratuitously to use an object owned by the lender; however, this obligation does not come into existence until the lender relinquishes the object to the borrower. A gratuitous loan differs from a lease in that the borrower, unlike a lessee, obtains the gratuitous use of the object and differs from an ordinary loan (*Darlehen*),¹⁰⁶ in that the very object actually lent must be returned (*e.g.*, the book actually borrowed must be returned). If the duration of a gratuitous loan is not provided for in the contract nor can be implied from its purpose, then the lender at any time can demand the return of the object. The borrower is responsible for gross negligence and must bear the ordinary maintenance expenses of the object, but he is not responsible for ordinary wear and tear. All claims which the lender or borrower have against the other must be brought within six months after they arise.

H. LOANS (*DARLEHEN*)

A loan is a contract pursuant to which the borrower (who has received money or other fungibles from the lender) is obligated to repay the borrowed money or return to the lender fungibles of the same kind, quality, and quantity.¹⁰⁷ In business, loans of money are only extended upon the payment of interest and, sometimes, also on a discount deducted in advance from the principal sum. If the contract does not provide otherwise, the loan is repayable when either the lender or

106. See *infra* Part VI.H.

107. BGB § 607.

borrower gives notice of its termination. If the amount of the loan exceeds 300 DM, three months notice of termination must be given; smaller loans require only one month notice. If no interest is stipulated in the loan contract, the borrower can repay the loan without giving notice of its termination.¹⁰⁸ If the loan contract requires a fixed rate of interest to be paid for a specified period, then during that period the loan contract cannot be terminated; however, such loans may not exceed 10 years. Loans which bear a fixed rate of interest (and are not secured by a mortgage on real property) can usually be terminated after the loan has been in existence for six months by giving three months notice. Loans which bear a variable rate of interest can be terminated by giving three months notice.¹⁰⁹ A promise to make a loan in the future may be revoked by the lender if there has been a substantial deterioration in the borrower's financial condition which will endanger the repayment of the loan.¹¹⁰

If the borrower himself (or together with the borrower's surety) is responsible for the repayment of the loans, the loan is an unsecured loan (*Personalkredit*). If the lender obtained security,¹¹¹ then the loan is referred to as a *Realkredit*, a secured loan.

I. CONTRACT FOR SERVICES (*DIENSTVERTRAG*)

A contract for service (*Dienstvertrag*) creates an obligation to provide service to another (the master) who is obligated to pay the agreed-upon remuneration to the servant. A contract for service can be for service of any kind.¹¹² Unless otherwise provided, the servant must personally perform the service and the claim for the service to be performed cannot be assigned. However, if a business is transferred, the new owner assumes the rights and obligations of all contracts for service which are in existence at the time of the transfer.

108. *Id.* § 609.

109. *Id.* § 609(a).

110. *Id.* § 610.

111. *See supra* text accompanying note 59.

112. BGB § 611.

The contract for service (*Dienstvertrag*) differs from the contract to provide material and service (*Werkvertrag*),¹¹³ in that the former only involves an obligation to perform service for a determined or an indefinite time period, whereas the *Werkvertrag* imposes the obligation to bring about a particular result, often a particular finished product. Thus, a physician who contracts to treat a patient enters into a *Dienstvertrag* while an architect who contracts to build a house enters into a *Werkvertrag*. Although the employment contract (*Arbeitsvertrag*) is the most common and numerous form of the contract for service, employment contracts of public as well as private employees are governed by the extensive specialized rules of Labor Law.

If the parties to a contract for service failed to provide for the amount of remuneration but there is an applicable fee schedule, then remuneration will be based on the fee schedule; if there is no applicable fee schedule, the remuneration will be the local customary remuneration.¹¹⁴ The master is obligated to arrange and maintain the work area and equipment used by the servant in such condition that the servant's life and health is protected as much as the nature of the service to be performed permits.¹¹⁵ This basic obligation imposed by § 618 of the Civil Code is supplemented by extensive health and safety regulations. If the master is in default in accepting the service when it is tendered, the servant is nevertheless entitled to be remunerated despite his failure to provide the service; furthermore, the servant is not subsequently obligated to make up for the service which was not accepted when tendered. However, the servant's remuneration is then reduced by the value of what he saved by not having to perform the service.¹¹⁶ Whether or not the servant is entitled to remuneration when the performance of the contracted service becomes impossible because of a circumstance for which neither side is responsible depends on whether the interruption of service is considered within: (1) the servant's sphere and thus the servant's responsibility or (2) the master's sphere and thus the master's re-

113. See *infra* Part VI.J.

114. BGB § 612.

115. *Id.* § 618.

116. *Id.* § 615.

sponsibility. The risks of doing business (such as an interruption of the supply of materials, breakdown of machinery, or power or heating failures) are generally considered to be within the master's sphere. The master is then obligated to remunerate the servant despite the latter's failure to perform the service; on the other hand, the master is not obligated to remunerate the servant if the master's operations are interrupted by strikes.

A servant does not lose his claim for remuneration if, for a reason beyond his control which affects his person, he is unable to render his service for a relatively insignificant time period; however, if the servant receives compensatory insurance payments, then the remuneration to which he is entitled is reduced by the amount of such insurance payments. If a servant who is unable to work because of illness, pregnancy, or rehabilitation, is considered an employee within the meaning of the Law on the Continuation of Wage Payments (*Lohnfortzahlungsgesetz*), then that Law entitles such employee to have his wages continued, typically for six weeks.

Employment contracts can only be terminated pursuant to the very detailed provisions of Labor Law, particularly the Termination of Employment Act. A contract for service, however, is terminated by:

1. The expiration of the stipulated period;
2. Achieving the purpose for which it was formed;
3. The death of the servant;
4. The agreement of both sides to terminate the service contract; or
5. *Kuendigung*, that is, by giving notice terminating the contract.

A contract for service (but not an employment contract) for an indefinite period can be terminated by either side giving ordinary notice which equals the pay period, if such period is a day or a week; if the pay period is a month, notice is to be

given no later than the 15th of the month. If there are no pay periods agreed upon, either side can give notice of termination at any time.¹¹⁷ After ordinary notice has been given, the servant is entitled to reasonable time off to look for other opportunities as well as a letter of reference.¹¹⁸

A contract for service, whether for a fixed or indefinite period, can be terminated by either side giving extraordinary notice, that is, notice effective immediately if there exists such a serious reason that the party giving the notice cannot be expected to continue the relationship.¹¹⁹

J. CONTRACTS FOR SERVICES AND MATERIAL (*WERKVERTRAG*)

Unlike a contract for service (*Dienstvertrag*) which only involves an obligation to provide service for a fixed or indefinite period,¹²⁰ the *Werkvertrag* (contract for service and material) involves an obligation on the part of an independent contractor (*Unternehmer*) (hereinafter contractor) to produce a particular result (often a tangible finished product) for a customer (*Besteller*) who is obligated to pay for it when he accepts it.¹²¹ Unlike a servant, a contractor is not subject to the control of the customer. A *Werkvertrag* differs from a *sales* contract in that the contractor promises to produce a particular result (a portrait to be painted, plumbing to be replaced, or a home to be built), whereas a seller promises to transfer something already in existence.

The contractor warrants that the finished work will have the qualities stipulated in the contract, and that it will contain no defects which would destroy or diminish its value or fitness for its customary or stipulated use. If there are material defects or qualities missing in the finished work, the customer must first notify the contractor so that the latter has a reasonable time period to cure the defect. If the contractor fails to cure the defect within such period, the customer may do so and

117. BGB §§ 620-622.

118. *Id.* §§ 629-630.

119. *Id.* § 626.

120. *See supra* Part VI.I.

121. *See* BGB §§ 631, 641.

obtain reimbursement of his expenses or, in the alternative, the customer is entitled either to have the contract price reduced by an appropriate amount (*Minderung*) or rescind the contract (*Wandlung*). If it is not possible to cure the defect or if the contractor has refused to do so, the customer is entitled to either price reduction or rescission without having to allow the contractor a reasonable time period to cure the defect. If the defect in the finished work is due to a circumstance for which the contractor is responsible, the customer, instead of rescission or price reduction, is entitled to claim money damages equal to the amount of money needed to put the work in the condition it would have been in had the contractor duly performed.¹²² Until the work is accepted by the customer, he can at any time notify the contractor that he is canceling the agreement. If such notice is given, the contractor is entitled to the full remuneration agreed upon in the contract less the expenses he saved because of the customer's cancellation of the contract. If the customer accepts a work knowing that it has a defect, he is not entitled to obtain any relief, unless at the time of acceptance, he reserved his rights on account of the defect.

If the customer, after having been given a reasonable time to do so, fails to perform an act necessary for the production of the work, the contractor has the right to rescind the contract or, in the alternative, claim monetary compensation equaling the agreed-upon compensation less his savings for not having to complete the work. If, before its acceptance, the work is destroyed or damaged, or can no longer be feasibly completed because of some defect in the material, or instructions supplied by the customer, or because of the customer's failure to perform a necessary act (without any contributory circumstance for which the contractor is responsible), the contractor is entitled to that part of the agreed remuneration attributable to the part of the work already completed plus reimbursement for expenses actually incurred, unless such expenses were to be part of such proportionate remuneration.¹²³

Unless it is impossible because of the condition of the work, the customer is required to accept the work if it is com-

122. *Id.* §§ 633-635, 640(2).

123. *Id.* § 645.

pleted in accordance with the contractual stipulations.¹²⁴ The customer's acceptance is important because the agreed compensation is then due and payable, unless part payments were to be made which become due upon acceptance of the completed part in question. It is also important because, unless otherwise provided for in the contract, the risk of accidental loss, destruction, or deterioration passes to the customer. If the contractor ships the work as requested by the customer, these risks pass to the customer upon the work's delivery to the carrier. If the customer refused to accept the work properly completed when it was duly tendered, these risks also pass to him; he must pay the agreed compensation despite the accidental loss, destruction, or deterioration of the work.

Unless the parties agreed otherwise, the customer who reserved his rights must sue upon them within six months from accepting the work; in the case of work on real property, the suit must be brought within one year and for building construction contracts, within five years. If the contractor intentionally concealed a defect, the customer has 30 years to sue. If the parties to a building construction contract agreed to adopt in their entirety the contract terms required by the rules for the award of public works contracts (*Verdingungsordnung fuer Bauleistungen*), then the period is two years.

Contractors have a statutory lien (pledge) on the personal property to be produced or improved for the customer in order to secure their rights under the contract, provided such personal property is or comes into their possession in the course of such production or improvement. There is some doubt whether a contractor's lien attaches to personal property not owned by the customer. So far, the courts have refused to allow a lien under such circumstances.

124. *Id.* § 604(1).

1. Special Types of *Werkvertrag*

a. *Werklieferungsvertrag*

The *Werklieferungsvertrag* is a contract which obligates the contractor to produce the work from material furnished by him and to deliver and transfer its ownership to the customer, e.g., a customer ordering a pair of size 9 shoes from a shoe manufacturer's catalogue. Although such a contract is partly a sales contract (*Kaufvertrag*) and partly a contract for service and material (*Werkvertrag*), it is generally treated as if it were a sales contract. However, if a nonfungible work is to be produced (e.g., a custom-made suit, or specially designed machinery), the rules governing a contract for service and material (*Werkvertrag*) apply *except* for title defects which are governed by sales contract rules. If the contractor is only obligated to provide trimmings, ornamentation, or other accessories (for example, on a dress), then the rules of the *Werkvertrag* apply exclusively.¹²⁵

b. Travel contract (*Reisevertrag*)

A travel contract is a species of *Werkvertrag*¹²⁶ which obligates the trip organizer to provide to the traveler a combination of travel services (the trip) as agreed in the contract and which obligates the traveler to pay the agreed price. However, procuring a single travel service, e.g., an airline ticket, is not a travel contract. The travel contract is governed by §§ 651(a)-(k) of the Civil Code, and the parties by their agreement cannot alter those provisions to the disadvantage of the traveler.

Provisions in a travel contract which obligate the traveler to pay a deposit in advance are valid, but provisions which in addition require the traveler before the start of the trip to pay the entire price are invalid. The travel organizer is only entitled to demand payment in full before the start of the trip if: (1) it has been determined that the trip will actually take place, and (2) the travel documents are delivered to the travel-

125. *Id.* § 561.

126. *See supra* Part VI.J.

er, that is, those documents which provide direct evidence of the traveler's claim against the principal providers of the travel services included in his trip, particularly carriers and hotels. If the travel organizer cannot meet these two requirements, he must permit the traveler to pay the unpaid balance shortly before the start of the trip.¹²⁷ Until the trip has started, the traveler is entitled to substitute an appropriate person for himself as well as rescind the contract; in the latter event, however, the trip organizer is entitled to monetary compensation which equals the contract price less: (1) the value of what he saved because of the rescission, or (2) less what he could have realized from utilizing the canceled travel services for another purpose.

The travel organizer warrants that the trip will be as promised in the contract and will be free of deficiencies. If a deficiency (*Mangel*) occurs during the trip (*e.g.*, having to stay in a third rate hotel instead of the luxury hotel shown in the travel brochure), then the traveler is entitled to have the deficiency cured or receive a price reduction provided the traveler notified the trip organizer of the deficiency at the time it occurs (*e.g.*, at the resort).

If the trip has been impaired *in a major way*, but the travel organizer, after having been warned by the traveler to cure such impairment, within a reasonable time fails to do so, then the traveler is entitled to rescind the contract. In that event, the trip organizer is entitled to monetary compensation from the traveler only for travel services already performed or which the traveler still desires to be performed; but, otherwise, the former must bear the expenses necessitated by the rescission (*e.g.*, a ticket to return home for the traveler). In the latter situation, the traveler also has the option to obtain monetary compensation in an amount which reflects the reduced value of the trip. Whichever option chosen, the traveler is entitled to an appropriate amount of money to compensate for whatever days of his vacation (holiday) were needlessly wasted.

127. See Decision of the BGH of 12 April 1987.

Of course, a trip organizer is not required to remedy a deficiency unless it occurred because of something for which he is responsible. If the trip is materially impaired because of an unforeseen act of God (*force majeure*), both sides have the right to rescind the travel contract; however, any expenses incurred because of such rescission must be borne by the traveler, except for the cost of the trip home, which is divided between both sides.

By a provision in the contract, a travel organizer can limit his liability to three times the price of the trip. However, such limit applies only to his own negligence or the negligence of third parties which is exclusively within the third parties' control, e.g., the control of a hotel or an airline, provided the acts in question create claims for compensation based on the travel contract, not claims based on tortious acts.

A traveler must notify the trip organizer of his claims within one month after the contractually stipulated end of the trip, unless the traveler was unable to do so for reasons beyond his control. If the traveler already during the trip unequivocally and unconditionally claimed his rights on account of deficiencies in the trip, he does not have to notify the travel organizer of such claims within one month of the trip's end. Instead of notifying the trip organizer, the traveler can notify the independent travel agency which booked the trip. In any event, the traveler must bring any legal action within six months of the contractually stipulated end of the trip.

c. Broker's contract (*Maklervertrag*)

A broker's contract obligates the customer to pay the broker a commission for: (1) providing information concerning an opportunity to bring about a contract, or (2) acting as a go-between (intermediary) to bring about a contract, provided a contract does come into existence because of the broker's efforts.¹²⁸ The broker then is entitled to the agreed-upon commission in the contract, or, if not so agreed, to a commission in accordance with an applicable fee schedule, or if there is no

128. BGB § 642.

applicable fee schedule, to what is locally considered a customary commission.¹²⁹ A commission which does not depend on the effectiveness of the broker's efforts or on the actual conclusion of a contract is payable only if such terms are clearly and unequivocally spelled out in a specially prepared commission contract; a provision in a standard form contract does not suffice. Brokers are entitled to be reimbursed by the customer for their expenses, only for what is expressly provided for in the commission contract.

A broker's contract need not be in writing or follow a particular form (even for real property contracts) and it does not obligate, but only permits, the broker to act only for one party, not the other side. Both the broker and customer can cancel the contract at any time. If the customer enters into an exclusive contract (*Alleinauftrag*) with the broker, the customer is not permitted to use the services of another broker and, for the period that such contract is to be in effect, the customer has no right to rescind it. However, an exclusive contract obligates, not merely permits, the broker to act on behalf of the customer.

The activities of commercial brokers are governed by the provisions of the Commercial Code §§ 93, *et seq.*. The activities of apartment brokers are governed by a special statute, the *Gesetz zur Regelung der Wohnungsvermittlung* (Law on the Regulation on Apartment Procurement) of November 4, 1971. An apartment broker is entitled to a commission only if an apartment lease is concluded because of his efforts or the information furnished by him; he is not entitled to a commission if there is only an extension of the term of an apartment lease or if the broker has a legal or economic interest in the leased apartment. The commission of an apartment broker must be expressed in a fraction or multiples of the monthly rent. Contractual penalties may not exceed 10% of the commission and in no event 50 DM. Apartment brokers are not permitted to demand or accept payment in advance, nor exact a promise that they will be paid their commission even if their efforts are not successful.

129. *Id.* § 653.

Marriage brokers are not allowed to sue for their commission or, by some contractual subterfuge, create a legally enforceable obligation for their commission, but what has been paid to them on account need not be refunded to the customer.¹³⁰ For that reason marriage brokers only provide their services if they are paid in advance.

K. REWARD (*AUSLOBUNG*)

A reward (*Auslobung*) occurs when someone publicly announces his unilateral promise to pay a reward for the performance of an act, especially for the achievement of a particular result. No acceptance of the promise is required. Anyone who performs the requested act is entitled to the reward whether or not he knew of the promise.¹³¹ Unless a time period for performance was included in the publicized promise, the promise to pay the reward can be revoked in the same manner as it was publicized any time before the requested act has been performed; the promise can also be revoked by giving special notice of its revocation.

If the requested act has been performed *successively* by different persons, the reward belongs to the first performer. If the requested act has been performed *simultaneously* by different persons, they share the reward equally if it can be shared; otherwise, it is decided by lot. If several persons have participated in bringing about the desired result, the reward shall be distributed equitably among them, considering the size and kind of their individual contributions.¹³²

A particular form of reward occurs when it involves a competition or contest for prizes (*Preisauusschreiben*), and the award of the prizes depends on the decision of the contest or competition judges. The public announcement of such contests or competitions must include a time limit within which performance must take place.¹³³ If the requested performance can be fulfilled easily, legally there really is a lottery

130. See BGB § 656.

131. *Id.* § 657.

132. *Id.* §§ 659-660.

133. *Id.* § 661.

(*Ausspielung*), and a lottery is not valid unless it has been officially approved.¹³⁴

L. MANDATE (*AUFTRAG*)

Mandate is a gratuitous contract by which one party, the mandatory (*Beauftragter*), obligates himself to do something on behalf of another, the mandator (*Auftraggeber*). For example, A promises to pick up B's car which B left at the airport, and drive it back to B's home. If a mandatory were entitled to be compensated for his performance, the contract would be a contract for service (*Dienstvertrag*) or a contract of employment (*Arbeitsvertrag*) or, under different circumstances, a contract for material and service (*Werkvertrag*).¹³⁵ The mandate does not have to be in writing or follow a particular form.

Although the mandatory receives no consideration for undertaking the obligation, the mandate is considered a legally enforceable contract. The mandate only governs the relationship between the parties. The mandate in and of itself confers no authority to represent the mandator with third parties. Nevertheless, such authority is typically conferred, and entitles the mandatory to act in the name and on behalf of the mandator with third parties.

The task of a mandatory can be practically anything, provided it will be performed gratuitously and, ordinarily, by the mandatory himself. The mandatory is obligated to follow the mandator's instruction (except where circumstances require otherwise), as well as keep the mandator informed. The mandatory must account for money and other property received or disbursed, but the mandator must reimburse the mandatory for necessary expenses. Although the mandatory is obligated to perform without being entitled to receive consideration for his performance, he is liable for the nonperformance and for imperfect performance of the contract, as well as for his ordinary negligence in performing his task.

134. See *infra*, Gaming and Betting, Part VI.S.

135. See *supra* Part VI.J.

The mandate ends upon the expiration of the stipulated time period or upon having achieved its purpose. Both sides may rescind the contract at any time. The death of the mandatory usually ends the contract, but the death or incapacity of the mandator usually does not. In any event, the end of the mandate terminates whatever authority was conferred to carry it out.¹³⁶

M. MANAGING ABSENT MANDATE (*GESCHAEFTSFUEHRUNG OHNE AUFTRAG*)

This kind of transaction occurs when one person, who can be thought of as a manager, takes care of the affairs of another, who can be thought of as the "client," without having received a mandate from the latter and without being entitled to do so by virtue of a contract or by operation of law (*e.g.*, a guardian). The origin of this "contract" lies in the Roman Law concept of *negotiorum gestio*, the friendly intermeddler.

The manager is allowed to act if he is acting in the interest of and in accordance with the actual or implied wishes of the client. If the manager acts contrary to such wishes, he must compensate the client for all resulting injuries even if no other fault is imputable to the manager. A manager is also allowed to act if he is acting: (1) to perform an obligation of the client when the performance thereof is in the public interest, or (2) to fulfill a statutory obligation of the client to provide maintenance for others, provided such performance or fulfillment would not have taken place in due time. In these two situations, the manager is not liable for acting against the wishes of the "client." Examples of this would be the rescue of a person attempting to commit suicide, or a physician who treats a seriously ill child against the express wishes of its parents.

The fact that the manager is also discharging an obligation of his own does not prevent him from acting on behalf of another person. For example, a parent who calls a physician to attend his unconscious child at the scene of an automobile

136. BGB §§ 662-676.

accident is not only taking care of his own parental obligation, but also is acting on behalf of the driver who caused the accident. In such a situation, the physician is a manager for the unconscious traffic victim, for the driver who caused the accident, for the person (the parent) who is obligated to provide maintenance for the injured child, and, possibly also, for the victim's medical insurance carrier.

The manager must notify the "client" as soon as practicable that he is managing the latter's affair(s). The manager is also responsible for keeping the "client" informed, and accounting for delivery to the "client" of anything he obtained for the "client." The manager is liable for any kind of negligence or intentional misconduct, even for ordinary negligence, but, if the manager acted to avert an imminent danger threatening the "client," the former is only liable for intentional misconduct or gross negligence.

Unless he intended to make a gift of them, a manager is entitled to be reimbursed for all the expenses he incurred and losses he suffered, provided he acted as permitted by the applicable rules of the Civil Code, namely §§ 677-682. However, if the manager's efforts enriched the "client," but the manager had not acted as permitted by the Code, the "client," in accordance with the rules of the unjust enrichment,¹³⁷ must return to the manager all that he acquired because of the manager's efforts, unless the manager intended to make a gift thereof or unless the "client" ratified the action of the manager. However, if the "client" ratified the manager's actions, the latter is entitled to his out-of-pocket expenses and losses.¹³⁸ In any event, the manager is never entitled to be compensated for his services.

If a manager is mistaken as to the identity of this "client," the true "client" acquires the rights and obligations arising from the manager's activities.¹³⁹ On the other hand, if a person acts in an affair in the mistaken belief that it is his own affair (although it is really an affair of another), such person is

137. *See supra* note 37.

138. BGB § 684.

139. *Id.* § 686.

not considered to be a manager acting for a "client."¹⁴⁰ Nevertheless, if a person deals with the affairs of another (the "client") as though they were his own, although he knows that he is not entitled to do so, then such person is the manager for the other (the "client").¹⁴¹

N. DEPOSIT (*VERWAHRUNG*)

A contract of deposit obligates the safekeeper (*Verwahrer*) to keep in his custody personal property delivered to him by the depositor (*Hinterleger*) regardless of whether the obligation is undertaken gratuitously or for compensation; however, if undertaken gratuitously, the safekeeper only needs to exercise such care as he is accustomed to exercise in his own affairs. If ownership of deposited fungible goods is transferred from the depositor to the safekeeper, but the latter is obligated to return fungibles of the same kind, quality, and quantity, then the transaction is not a deposit but a loan contract (*Darlehen*).¹⁴² If the contract of deposit is not an independent contract but is only a subsidiary part of another contract, then the rules governing the principal contract also govern the deposit.

The depositor must reimburse the safekeeper for the expenses incurred and losses suffered by the latter in safekeeping the deposited property. The depositor can demand the return of the property at any time even if a specific time for its return was agreed-upon. If no specific time for the return of the property was fixed, the safekeeper may require at any time that the depositor take back the property. However, if a time period had been agreed-upon, the safekeeper must have a serious reason to require the depositor to take back his property before the end of such period.¹⁴³

Property stored for safekeeping in a warehouse operated as a business is subject to rules of the Commercial Code, §§ 416-424. The contract which banks require when they accept deposits of *Wertpapiere* (securities) for managing and

140. *Id.* § 687(1).

141. *Id.* § 687(2).

142. *See supra* Part VI.H.

143. BGB §§ 688-697.

safekeeping is governed by the *Depotgesetz* (Security Deposit Act).

O. INNKEEPER'S LIABILITY FOR GUESTS' BELONGINGS (*BEHERBERGUNG*)

Innkeepers are persons or entities who are in business to provide lodging for guests; only operating a bar or a restaurant is not enough. Boarding houses are considered innkeepers, but not hospitals, railroads which furnish sleeping accommodations, ships which carry passengers, and airlines. An innkeeper is obligated to compensate a guest for injury to, or the destruction or loss of tangible things, except vehicles and their contents and live animals, brought by the guest unto the premises (or placed elsewhere on recommendation of the innkeeper or his employees) at the time of his arrival or a reasonable time before or after such arrival (e.g., luggage picked up at airport before or after the guest's arrival). However, the guest must inform the innkeeper without undue delay after discovering the injury, loss, or destruction.

The innkeeper is liable for an amount not exceeding 100 times the daily room rate but in no event less than 1,000 DM or more than 6,000 DM. In the case of money, securities, or valuables, the innkeeper's liability is limited to 1,500 DM because the innkeeper is legally obligated to accept such property for safekeeping on demand of the guest. However, these maximum limits do apply if the injury, loss, or destruction was due to the fault of the innkeeper or his employees.¹⁴⁴

To secure payment for lodging and other services, an innkeeper has a statutory lien extending over all tangible objects brought unto the inn's premises by the guest.¹⁴⁵

144. BGB § 701-703.

145. See *id.* §§ 559-563, 704.

P. PARTNERSHIP (*GESELLSCHAFT*)

A partnership recognized and governed by the Civil Code §§ 705-740 (hereinafter civil partnership) can be formed for any legitimate purpose. Commercial partnerships are also governed by the Civil Code except to the extent that the Commercial Code provides a different rule. A civil partnership contract does not have to be in writing or in any particular form. Unless otherwise agreed, partners are only obligated to make equal contributions and, subsequently, cannot be required to increase their contributions or to equalize losses suffered.

Because of his fiduciary obligation to the partnership, each partner must look after the interests of the partnership and refrain from doing anything which might injure such interests. However, in discharging this obligation, partners are held only to the standard of care they are accustomed to exercise in their own affairs.

Unless the partnership agreement provides otherwise, every transaction requires the consent of all the partners, and only the partners as a group are entitled to represent the partnership. The agreement, however, often will provide that decisions can be made by a majority of the partners or that the partnership shall be managed or represented by one or more designated partners to the exclusion of the others. Any managerial authority conferred upon a partner can be revoked for a serious reason, particularly for incompetence or for gross negligence in discharging his duties. Unless otherwise specified in the agreement, partners share in the profits or losses equally, regardless of their contribution to the partnership.

The assets of the partnership are owned jointly by all the partners, but not by any one partner individually. All the partners are jointly liable for partnership transactions not only with the partnership assets but also with the totality of the assets of each individual partner. However, unlike an "OHG" (a general commercial partnership), a civil partnership can agree with its creditors that its liability is limited to partnership assets. Partners are jointly responsible for torts committed by one partner in the performance of partnership functions;

however, if they can demonstrate that they exercised due diligence in selecting and supervising the latter in the performance of such function, they are not liable for the tortious acts of the latter.¹⁴⁶

Unless otherwise provided in the partnership agreement, the resignation of a partner, his bankruptcy, or death results in the dissolution of the partnership. However, a partner can unilaterally resign from the partnership only if that is specified in the partnership agreement or if all the other partners consent. A partner can be excluded from the partnership against his will by a decision of all the other partners, provided the partnership agreement specifies that the partnership will continue despite the severance of a partner. If a partnership continues notwithstanding the severance of a partner, his shares accrue to the remaining partners.

A share in a partnership can only be assigned or inherited with the consent of all the other partners. Such consent is also required to accept an additional partner; however, the partnership agreement can specify in advance under what conditions partnership shares can be transferred or new partners admitted.

As previously mentioned, the death, bankruptcy, or the resignation of a partner can result in the dissolution of the partnership. In addition, dissolution can result from:

1. A creditor levying execution against the assets of an individual partner;
2. The decision of all the partners;
3. Expiration of the time period for which it was set up; or
4. The attainment or the impossibility of attaining its stipulated objective.

146. See BGB § 831.

The dissolved partnership, however, continues as an *Abwicklungsgesellschaft*, an entity whose affairs are being concluded. Unless otherwise specified in the partnership agreement, the liquidation takes place in the following manner:

1. Return of deposits;
2. Return of objects only the use of which individual partners made available to the partnership;
3. Payment of all debts; and
4. The division of remaining assets (if any) to the partners according to the ratio in which they share profits.

If the partnership assets are not sufficient to satisfy all the debts or deposits, then the partners must make up for the deficiency in proportion to the ratio in which they share losses. The partnership is not considered legally dissolved until after the liquidation process is completed.

Q. JOINT OWNERSHIP (*BRUCHTEILSGEMEINSCHAFT*)

If a right is owned by more than one person but it is owned in shares, it is held in “fractionally-shared” ownership (*Bruchteilsgemeinschaft*), that is, it is held jointly and severally. The *Bruchteilsgemeinschaft* differs from the *Gesamthandsgemeinschaft* where two or more persons jointly own a right but not in fractional shares, each having the same interest in the whole. Civil partnerships, associations, general commercial partnerships (OHG), limited partnerships (KG), marital community property regimes, or a community of heirs are examples of a *Gesamthandsgemeinschaft*.

When a right is owned jointly and severally (*Bruchteilsgemeinschaft*), there is a presumption that each shareholder owns an equal undivided share; otherwise, each shareholder owns an unequal fractional undivided share. Each shareholder is authorized to use the jointly owned right or object to the extent that it does not interfere with such use of the other shareholders and also is entitled to share in the fruits, if any, according to the size of his share. The manage-

ment of the right or object belong to the shareholders as a group. Even without the consent of the shareholders, each shareholder is entitled to do what is necessary to preserve the right or the object. Nevertheless, a majority of the shareholders (as determined by the size of the shares, not the number of the shareholders) can adopt rules for the use or management of the jointly owned right or object. A shareholder can, at any time, demand the dissolution of the joint and several ownership regime; he can do so for serious cause even if the shareholders had agreed otherwise in the contract. This is a rule of mandatory law which cannot be changed by the shareholders. A shareholder can also demand partition if that can be effected in kind or, if not, demand that the right or object be sold and the proceeds distributed, each shareholder getting his fractional share.¹⁴⁷

R. ANNUITY (*LEIBRENTE*)

An annuity consists of an obligation to pay money or provide other fungibles at regularly recurring intervals, typically yearly intervals. An annuity is usually based on a contract or on a legacy in a will which requires that annual payment or distributions are made to the beneficiary. To be legally effective, the promise of an annuity must be in writing. If the promise is made gratuitously, it requires a notarized document. If the annuity promise is the consideration for an inheritance contract by which a retiring farmer disposes of his farm, it must also be embodied in a notarized document. There is a presumption that the annuity is to be paid for the lifetime of the beneficiary.

S. GAMING AND BETTING (*SPIEL AND WETTE*)

Private betting and *private* games of chance do not create legally enforceable debts. A bill of exchange or check given in payment of a private gaming or betting debt cannot be legally enforced. However, any money paid by the debtor on account of such a debt cannot be recovered by the debtor. Nevertheless, because it is a criminal offense to arrange for *public* lotteries

147. *Id.* §§ 741-758.

or *public* games of chance without an official license,¹⁴⁸ whatever is paid by the debtor to the *public* lotteries or games can be recovered by him. On the other hand, if a *public* lottery, *public* game of chance, bookmaking, or other betting at horse races is officially licensed, then such activities result in legally enforceable debts. Speculation in futures of goods or securities (but not forward transactions) are considered games of chance only if the difference between the agreed price and the stock exchange or market price shall be paid by the losing to the winning party.¹⁴⁹

T. GUARANTY (SURETYSHIP) (*BUERGSCHAFT*)

The suretyship contract obligates the surety (*Buerge*) to perform an obligation which another (the principal debtor) owes a creditor, but only in the event the principal debtor fails to do so. Of course, a suretyship contract presupposes the existence of an obligation of the principal debtor to the creditor. Unless the surety is a regular merchant and the undertaking is a commercial transaction, the surety's promise must be in writing. If the surety has performed, the lack of a written promise is immaterial.¹⁵⁰ If several persons are obligated as surety on the same commitment, they are jointly and severally liable.

The extent of the principal's obligation determines the extent of the surety's obligation, but nothing subsequently done or subsequently agreed to by the principal debtor and the creditor increases the surety's obligation. The surety, unless he is a regular merchant, has the *Einrede der Vorausklage*, that is, the right to refuse to satisfy the creditor unless and until the creditor has been unsuccessful in his attempt to levy compulsory execution against the principal debtor except if:

1. The surety has waived such right (in which case the surety is substituted for and is liable as the principal debtor) (*Selbstschuldnerische Buergschaft*);

148. See Strafgesetzbuch (Penal Code) StGB §§ 284, 286.

149. BGB §§ 762-764.

150. See *id.* § 766; HGB § 350.

2. Bankruptcy proceedings have been instituted against the principal debtor;

3. The principal debtor has changed his domicile, place of business, or habitual residence; or

4. The principal debtor is judgment proof.¹⁵¹

The surety can also refuse to perform as long as the creditor could satisfy the indebtedness from what he (the creditor) owes the principal debtor;¹⁵² in addition, the surety can interpose all the defenses which the principal debtor could interpose even if the latter has already waived such defenses.¹⁵³ However, if the surety does satisfy the creditor, the debt is not extinguished, but the surety is substituted for the creditor and obtains all the claims of the latter together with whatever security the principal debtor had provided to the creditor.¹⁵⁴

German law also recognizes something called *Garantievertrag* (guaranty contract), although the Civil Code does not specifically provide for it. By a *Garantievertrag*, which does not have to be in writing, one party promises another party a particular result (frequently the absence of a risk), e.g., the absence of the risk that a debtor of a promisee will not pay.

A *Garantievertrag* is really very similar to an indemnity contract as recognized in Anglo-American law and not to a suretyship contract; that is, the former creates an obligation independent of any other obligation. Nevertheless, German courts tend to treat a contract by which one party promises to be liable in the event a third party does not perform its obligations as a *Garantievertrag* rather than a suretyship contract whenever the promisor is personally interested that the contract between the principal debtor and creditor will be performed.

151. BGB §§ 771, 773.

152. *Id.* § 770(2).

153. *Id.* § 770(1).

154. *Id.* § 774.

Where a person undertakes to be liable as a principal debtor *in addition* to the original principal debtor (and such undertaking, not being a surety contract, need not be in writing), the contract is called *Kumulative Schulduebernahme* (cumulative assumption of obligation). The party undertaking such obligation is liable just as if he were the original debtor. Thus, the original principal debtor and the additional principal debtor are both obligated, independently of each other, to the creditor; but, the satisfaction of the creditor by one of them exonerates the other.

When one party instructs another to extend credit to a third party, the contract is called a *Kreditauftrag* (credit agreement), but the former is liable as a surety.¹⁵⁵

U. COMPROMISE (*VERGLEICH*)

A *Vergleich* (compromise) is a contract by which the parties, after making mutual concessions, terminate a dispute or uncertainty concerning a legal relationship. Such contract does not have to be in writing or notarized unless it affects a matter which requires such formality; however, a *Vergleich* is not legally effective if the state of affairs assumed to exist by the parties does not correspond to the actual facts and the dispute or the uncertainty would not have arisen if the actual facts had been known (e.g., when the heirs have entered into a compromise concerning the interpretation of a will which turns out to be invalid).¹⁵⁶

A special type of *Vergleich* is the *Prozessvergleich*, a settlement entered in the course of judicial proceedings which differs from the nonjudicial compromise in that it, although not constituting a court order, can be enforced in the same way as a court order.¹⁵⁷

155. *Id.* § 778.

156. *Id.* § 799.

157. *See* ZPO § 794(1).

V. UNILATERAL PROMISE TO PERFORM (*SCHULDVERSPRECHEN*) AND ACKNOWLEDGEMENT OF OBLIGATION (*SCHULDANERKENNTNIS*)

A *Schuldversprechen* (unilateral promise to perform) consists of a unilateral *written* promise to perform some act where the obligation to perform the promised act is created solely by the written promise itself.¹⁵⁸ A *Schuldanerkenntnis* (acknowledgement of obligation) is an acknowledgement of the existence of an obligation or debt which must be in writing unless a more stringent form is required, *e.g.*, a notarized document for a promise to make a gift. If the promise to perform or the acknowledgment of an obligation is made by a regular merchant (*Vollkaufmann*), or is part of a settlement of accounts or of a compromise, no writing is needed.

Both types of undertakings are considered abstract legal transactions in that they are independently legally effective, separate and apart from the reason why such an obligation was assumed, despite the fact that they are often undertaken because of a pre-existing obligation. In the latter situation, the reason for such an undertaking is to lessen the creditor's burden of proof, as well as to exclude whatever defenses the promisor could have interposed when sued on the basis of the pre-existing obligation. However, if the pre-existing obligation has been satisfied, the creditor (on the basis of unjust enrichment) must return the document which promised the performance or which acknowledged the existence of an obligation.

W. DOCUMENT ORDERING PAYMENT OF MONEY OR DELIVERY OF OTHER THINGS (*ANWEISUNG*)

An *Anweisung* is a written document by which the person who drew up the document (the drawer) authorizes, but does not require, another (the drawee) to pay or deliver to a third party money, securities, or fungibles for the account of the drawer and which authorizes the third party (the payee or beneficiary) to collect such from the drawee.¹⁵⁹ The drawee is

158. BGB § 780.

159. *Id.* § 783.

not obligated to perform in favor of the third party (the payee or beneficiary) until he has placed his written notation of acceptance on the document. The drawer is entitled to revoke the instrument until the drawee accepts or performs. In any event, the drawee is only obligated to perform in exchange for the delivery of the document. The payee (beneficiary) must inform the drawer, without delay, in the event that the drawee refuses to accept or perform. By written endorsement and delivery of the document, a payee (beneficiary) ordinarily can transfer his rights to another party.¹⁶⁰ Claims based on these instruments must be made within three years after they arise.¹⁶¹ Special forms of *Anweisung* are the commercial *Anweisung*,¹⁶² bills of exchange (*Wechsel*), and checks (*Schecks*); the latter two are governed by two different statutes (*Wechselgesetz* and *Scheckgesetz*).

X. BEARER BONDS (*SCHULDVERSCHREIBUNG AUF DEN INHABER*)

This type of contract consists of a written instrument by which the issuer promises to perform a certain act on demand of the bearer of the instrument. The issuer is obligated to perform only upon delivery of the instrument to him. The issuer may raise against the bearer only those defenses which affect the validity of the issued instrument, which appear from the instrument itself, or which the issuer is entitled to assert directly against the bearer. Even if the bearer does not have the right to demand it, the issuer's performance in favor of the bearer releases the issuer from his obligation. Ownership of bearer instruments is transferred by delivery. Anyone may issue bearer instruments, but the approval of the Federal Government of the Republic is required if the issuer of the instrument promises to pay money to the bearer. A bearer instrument, which promises to pay money to the bearer differs from a promisory note (*Eigener Wechsel*) in that the former is issued as part of a large issue of securities, and for consideration; a promisory note is a single instrument not part of a large issue of securities and may or may not be issued for consideration. Law suits based on bearer instruments must be brought within

160. *Id.* §§ 784-785, 789-790, 792.

161. *Id.* § 786.

162. HGB §§ 363, 368.

30 years after the date fixed for performance; interest and the like must be sued for within four years after the expiration of the year in which it became due.^{163***}

163. *Id.* §§ BGB 793-808(a).

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